United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

526

No. 23,777

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

In the Matter of:

IDA VIOLA SHAW,

Patient

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

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STATEMENT OF ISSUES PRESENTED

1. Whether the evidence was sufficient to show likelihood that if allowed her liberty the patient would be dangerous to herself or others?

2. Whether opinion evidence from expert and lay witnesses that the patient was likely to be dangerous if released should have been admitted when no basis was offered by any of the witnesses for that testimony?

3. Whether there was error in the Court's instructions to the jury when he failed to instruct on the definition of injuriousness, summarized the government's evidence without mention of the respondent's evidence, and failed to advise the jury that they must decide the case for respondent in the event that the government had not met its burden of persuasion.

4. Whether a jury trial conducted without rules of procedure, and in violation of the rules of evidence deprived the patient of her liberty without due process of law?

STATEMENT OF WHETHER THIS CASE HAS PREVIOUSLY BEEN BEFORE THIS COURT

This case was before this Court under the same name and number on a Motion for the Transcribing of a Transcript. It has not been before the Court on any other occasion.

REFERENCES AND RULINGS

There are no opinions, memoranda, findings or conclusions by the Court setting forth the basis of the judgment presented for review of this Court. The jury trial in this case was followed by a form order of judicial hospitalization.

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TREATISES

STATEMENT OF CASE

On July 31, 1969, appellant appeared at a White House gate, seeking to see the President. A search of her pocketbook, routine when anyone asks for the President without an appointment, (TR. 5-8)* revealed a gun. A Secret Service Agent ordered her to St. Elizabeths Hospital for an emergency hospitalization, 21 D.C. Code § 521, which was followed by the hospital's Petition for Judicial Hospitalization, 21 D.C. Code § 541, filed on August 8, 1969. On August 21, 1969, she appeared before the Commission on Mental Health, which found her mentally ill and likely to injure herself or others if released. The next day, she demanded a jury trial which was held on October 22, 1969. The jury agreed with the Commission on Mental Health. As a result of the verdict, she was

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* All transcript references are to the October 22, 1969 jury trial. The transcript has been filed as a supplemental record on this appeal by stipulation of counsel.

involuntarily committed to St. Elizabeths Hospital. From that verdict, this appeal is taken.[1/]

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STATEMENT OF FACTS

At trial, appellant did not contest mental illness, but urged that she was not likely to injure herself or others if allowed to be free. The government offered four witnesses; a White House policeman, a Secret Service Agent and two psychiatrists.

The White House policeman testified that he had made the search of Mrs. Shaw's pocketbook with her consent and she had even opened it for him

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1/ Notice of Appeal was filed on October 23, 1969. Leave to appeal *in forma pauperis* was granted, but the transcribing of a transcript at government expense denied. Appellant then sought an order for a transcript from this Court. The government responded that it would order a transcript and make a copy available to counsel. Upon this representation, the motion for transcription was denied. The transcript was ordered on or about January 12, 1970, but was not filed until March 27, 1970 and counsel did not receive a copy until April 8, 1970.

(TR. 6-7). When asked about Mrs. Shaw's manner and appearance, he responded:

> [S]he seemed sort of calm and she talked very clearly and every time we explained things to her she either gave us a yes answer, no answer, or gave us a full explanation. (TR. 8).

The second witness, Agent McGaw also conceded that Mrs. Shaw's manner was calm and cooperative. (TR. 16). On cross-examination, the Secret Service Agent testified that the gun found in the pocketbook could not have been fired because it was incorrectly loaded and that Mrs. Shaw had a Georgia gun-toter's license application, which she thought authorized her to carry the weapon. (TR. 15-16). She told both officers that she had the gun "for protection" against kidnappers. (TR. 7-13).

Agent McGaw was allowed over objection to testify that he had thought Mrs. Shaw was "mentally ill" and "a danger to herself or others", and that therefore he had arranged to have her taken to St. Elizabeths Hospital directly from the White House. (TR. 14).

Dr. Leon Konchegul testified that he was in charge of the service where Mrs. Shaw had been confined since July 31, 1969. He stated that she had been hospitalized on three occasions; twice in Columbus, Ohio and once in Georgia. (TR. 20). On the occasion when she was hospitalized in Georgia, "she told me ... she had in her possession, again, a gun." (TR. 22). His opinion was that she was suffering from schizophrenia, paranoid type and that her long-standing delusions involve the stealing of her large inheritance (TR. 21), and a number of kidnappings, which is how she views her prior hospitalizations. (TR. 26). The doctor's total direct testimony on the issue of whether she was likely to injure herself or others if allowed to be free was as follows:

> Q. Based on your diagnosis, would you say you have firm understanding of what her behavior pattern is, what her behavior is?
>
> A. Yes. Usually, when you have all of these distorted ideas, people being after you, money, you are always on guard. You always look over your shoulder, so to speak who is following you. (TR. 23).

* * *

Q. If she went out in the community today do you think she would be dangerous, likely to injure herself or others?

A. It is my feeling that until she trusts somebody, until something is explained to her ... that is why I suggested to her to return to ...

THE COURT: The question is, if she were restored to the community, would she be dangerous to herself or others?

THE WITNESS: At this moment I believe so, because she still has no insight, she has poor judgment. (TR. 25-26).

On cross-examination, the doctor agreed that her paranoia was not directed toward any particular people that she believed were after her (TR. 31-32), that she discussed her delusions "willingly, objectively," and "with foresight", (TR. 32) and that she exhibited no anger when discussing her paranoid feelings. (TR. 32). But Dr. Konchegul stated he did not

consider these factors important in analyzing dangerousness. He testified that he had not discussed with her how far she felt she was justified in going to protect herself, and that this too was not "necessarily" germane to diagnosing dangerousness. On further cross-examination, however, Dr. Konchegul changed his testimony to state that these four factors were "areas of inquiry" in assessing dangerousness. (TR. 35-36).

Dr. Angelos testified that he was a member of the Commission on Mental Health, that he had seen Mrs. Shaw briefly at the Commission hearing, and had also examined her the day before the trial. (TR. 40-41). His opinion was that she was mentally ill: -- his total testimony on dangerousness was as follows:

Q. It is your opinion then that if released she would be dangerous?

A. Yes. (TR. 40).

Both doctors testified that the prognosis for her recovery was "guarded", and that the

likelihood of her abandoning the delusions regarding her kidnappings was small. (TR. 25-42). Dr. Konchegul stated: "With time and tranquilizing drugs we have hope they will have a social recovery, as we call it, meaning they can function in the community." (TR. 25).

The defense called Mr. Anthony J. Martin who testified that he lived in Georgia, that he knew Mrs. Shaw because they attended the same church and that regularly for the past two years he and his wife had given her rides to and from church. (TR. 43). He testified that he had also taken her to the place where she was employed as a practical nurse. (TR. 43-44). He stated that in conversations with her, she had never demonstrated any anger toward any people or threatened anyone, or done or said anything that was violent in character. (TR. 45). His impression was that "she was a very devoted person. She said her prayers continually at home, as well as at church. She had gone to masses, and sometimes it was quite an ordeal to get there when she had no transportation." (TR. 44).

Mrs. Shaw testified that she was fifty-seven years old, that she had been working in the past two years as a practical nurse for "an aged man and I took care of the house for him, including giving him his medicine, his rubs, or whatever he needed in the home as a Red Cross practical nurse." (TR. 48).

She said she had come to Washington to see people in authority about the kidnappings and the loss of her money. She spent several days visiting senators' offices, and

> some time in the gallery listening to their speeches as they sat in session, and I took meals in the cafeteria of the Capitol, and one day -- the next day I went on a tour of Washington ... I was going back the 31st around noon. The plane was leaving at 12:30. I thought while I was here I could go down to the White House and get an appointment -- or talk with someone in authority, and they would give me some hope. ... (TR. 48-49).

She stated that she carried the gun for protection, that "Everybody was encouraged at home to obtain protection for themselves. I called the

law and told them who I was. They all know me there, could I have it, how to go about obtaining it, and I did." (TR. 50).

Finally, she testified she had no intention of using the gun on the President or anyone, and that she had never shot a gun, used a knife or assaulted anyone in her life. (TR. 51).

At the outset of the trial, counsel had submitted four requests to charge, and when seeking an opportunity to object if these were not given in substance, been told:

THE COURT: In the future, don't do this sort of thing.

MRS. BOWMAN: I haven't done this in the ten years I have been doing this (sic), but in this particular case I really think that a jury trial according to the rules of evidence would be better.

THE COURT: The rules of evidence apply, but we do away with formality as much as we possibly can. (TR. 3).

At the end of the evidence, counsel argued the case, which the Court allowed after telling the jury that closing arguments were unusual in mental health jury trials. The Court then instructed the jury as follows:

THE COURT: Ladies and gentlemen of the jury, we have now reached the stage of proceeding where it becomes the duty and responsibility of the Court to advise you as to the law that governs so that in finding the fact you may apply the law as given you by the Court, and thus do justice between the parties.

This case, as I initially told you, is not the ordinary type of civil case with which you have become familiar. Certainly it is not a criminal proceeding of any kind, character or description. It comes down to merely a sober and judicious inquiry by you into the mental health of the individual in question who sits here at the bar of the court. And counsel for the woman in question have admitted she is mentally ill. So, therefore, the only question you have to answer is, as a consequence of her mental illness, if she is allowed to remain at liberty, is she dangerous to herself or others. I will repeat, the only question you have to decide, and the clerk will ask you when you have reached your verdict, as a consequence of her mental illness, do you find she is likely to injure herself or others if allowed to remain at liberty.

The burden of proof in this case is upon the Government, represented by Mr. Ackerman here to prove the case of the Government by what we call the preponderance of the evidence. That is, that evidence which, weighed with that opposed to it, has the more convincing value.

Two psychiatrists took the stand here. Doctors not only specially trained in the field of medicine, but have also specialized in the field of mental health, psychiatry. And they say she is suffering from a form of mental illness, schizophrenia, paranoid type, schizophrenia being the general category, and paranoid type the special category. They testified persons suffering from that form of mental illness, schizophrenia, paranoid

type, indicate that by the manifestation of symptoms that people are following them and have ideas of persecution. It is the opinion of both psychiatrists, the Mental Health Commission, and the hospital that she is mentally ill and would be dangerous to herself or others if allowed to remain at liberty.

If there is any conflict of evidence you have to resolve it, for you are, after all, the ultimate deciders of fact. You are not bound by the testimony of any experts, no matter how expert they may be. You are bound to give the experts' opinion such weight you feel it is entitled.

If you feel any witness has perjured himself or herself, then you are at liberty to disregard such testimony, as the case may be, and give the testimony only such weight you think, in the circumstances, it is entitled.

You are so instructed.

You have to chose one of your members as foreman, and, of course, your verdict must be unanimous.

I think I should say this to you: with reference to the matter of danger, the defense has asked me to give you this instruction which I will.

You are instructed that the diagnostic label paranoia does not mean she is likely to cause injury to herself or others, but you are to weigh the diagnosis with the evidence in the case and make the determination yourself from all the evidence in the case, whether she is dangerous to herself or others.

I have covered the instructions in substance. You may retire.

MRS. BOWMAN: Your Honor, may we appraoch the bench?

THE COURT: Come to the bench, please.

(At the bench:)

MRS. BOWMAN: Your Honor, the one on likelihood of injury not a possibility but a likelihood --

THE COURT: I think likelihood covers it.

MRS. BOWMAN: Could I just enter my objection to it, because I don't think the instructions were given --

THE COURT: This instruction was given in substance.

Expert testimony, suffering from paranoia -- I will give this one.

MRS. BOWMAN: This is the one.

(In open court:)

THE COURT: Mrs. Shaw has not contested the fact that she is mentally ill, but the likelihood, if she were to remain at liberty, that she would injure herself or others. Consider this question. I instruct you to determine likelihood does not mean possibility, but probability, that is, there is more of a chance of injury that will occur than not.

Very well, you may retire, and deliberate this matter. The only question before you is whether or not she, being mentally ill, and that fact being admitted, as to whether she would injure herself or others if allowed to remain at liberty.

Thank you.

ARGUMENT

I THE EVIDENCE OF "DANGEROUSNESS" WAS TOO INSUBSTANTIAL TO SUPPORT THE VERDICT

In Millard v. Harris, 132 U.S. App. D.C. 146, 406 F.2d 964 (1968) this Court held that predictions of dangerousness require the following determinations: "the type of conduct in which the individual may engage, the likelihood or probability that he will in fact indulge in the conduct; and the effect such conduct if engaged in will have on others." 132 U.S. App. D.C. 146, 155, 406 F.2d 964 (1968). Cross v. Harris, ___ U.S. App. D.C. ___, 418 F.2d 1095 (1969) suggested that within this analytical framework "the unavoidably vague concept of 'dangerousness' [should be explored] on a case by case basis, in the traditional common-law fashion". 418 F.2d at 1099.

The first and third factors listed in Millard, supra, cannot even be considered here since there was no evidence about the kind of conduct in which appellant would probably engage. How her fears and fancies could cause her to react harmfully was never mentioned. In fact, most of the expert testimony was not even

related to her specifically but was about people generally who suffer from paranoia. The jury was told, for instance, "They have a feeling they are followed, persecuted. They have ideas of people watching them. We call it ideas of reference. And some of them hear voices." (TR. 22). (Of course, there was no testimony that Mrs. Shaw heard any voices on this hospitalization, or any relation of hearing voices to acting injuriously).

When asked about Mrs. Shaw's "behavior pattern", Dr. Konchegul testified, "Usually when you have all of these distorted ideas, people being after you, money, you are always on guard. You always look over your shoulder, so to speak, who is following you." (TR. 23).

What is missing -- inexplicably -- is how these symptoms relate to behavior which can even arguably be called dangerous. Apparently, government counsel was seeking to ease this aching void when he asked a hypothetical question (discussed <u>infra</u> p. 25) about whether Mrs. Shaw "might" on some unspecified occasion use the gun. To which the doctor replied

that "It is possible". (TR. 37). "But the requirement for commitment for dangerousness is not the mere possibility of serious harm, but its likelihood". Millard, supra, 132 U.S. App. D.C. at 159, 406 F.2d at 977.

In Cross, supra, this Court specifically stated that "a finding of 'dangerousness' must be based on a high probability of substantial injury", ___ U.S. App. D.C. ___, 418 F.2d 1097. Such a high probability cannot be spun out of testimony that appellant on two occasions had a gun and that she thinks she has been persecuted and robbed. There is not even any evidence that the gun she had when admitted to a mental hospital in 1963 was loaded. The gun she carried in her pocketbook here could not even have been fired. More importantly, her possession of the gun together with the history of her delusions actually support probabilities (as opposed to hypothetical possibilities) which cut against dangerousness. Her illness is long-standing, her delusions fixed. Yet there is not a shred of

evidence that she has ever acted on them to harm or attempt to harm anyone.[2/]

In sum, she has had the gun and the delusions for some time without injuring herself or others. Thus, the equation of gun plus delusions fails to make likelihood. If she were inclined to violence, she was faced here with the very situation in which she would be expected to erupt: "another kidnapping"; i.e. involuntary incarceration in a mental hospital. Yet all the testimony was that she was calm and cooperative.

In fact, the overwhelming evidence at trial was that she was not a danger to anyone. The following facts were undisputed: The calmness of her manner at the White House gate; her assent to the search; her possession of a license application for the gun; her fine and friendly manner on the ward;

2/ Compare Judge Leventhal's words in Dixon v. Jacobs, ___ U.S. App. D.C. ___, ___ F.2d ___ (No. 23,378, decided April 10, 1970, (concurring opinion) Slip op. p.22. "I think the existence of a substantial [mental] problem is not an adequate basis to confine or detain a man who has never harmed his fellow man, never committed the physical element of a crime ..."

the fact that she was in Washington for three days, had checked into a motel and was sight-seeing, without incident of any kind; the fact that she had lived in the community in Georgia, working as a licensed nurse for two years since her last hospitalization, also without incident, proving as Dr. Konchegul testified "These mentally ill people must take tranquilizing drugs, and if they have a good working relationship in the community, they manage to function very nicely in the community." (TR. 25).

Appellant submits that the judgment in this case must be reversed on the ground that the verdict is unsupported by "substantial" evidence: That is, "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion", Avignone Preres, Inc., et al. v. Cardillo, 73 U.S. App. D.C. 149, 117 F.2d 385, at 386, citing and quoting from Consolidated Edison Company v. N.L.R.B., 305 U.S. 197 (1958); Minnesota Mining & Mfg. Co. v. Coe, 73 U.S. App. D.C. 146, 118 F.2d 593. In this case, the

evidence of dangerousness did no "more than create a suspicion of existence of the fact to be established", N.L.R.B. v. Standard Oil Co., 124 F.2d 895, 903 (10th Cir. 1942).

II THE TESTIMONY OF THE MAJOR GOVERNMENT WITNESSES VIOLATED BASIC RULES OF EVIDENCE, AND UNSURPED THE FUNCTION OF THE JURY

A Secret Service Agent, and two psychiatrists testified to their opinion that Mrs. Shaw was dangerous to herself or others. The Secret Service Agent and Dr. Angelos offered no facts whatsoever to support their one-sentence conclusions. (TR. 40 & 14).

Dr. Konchegul's total testimony was somewhat fuller than that of the other two witnesses and the government may attempt to piece together some basis for his conclusion from the facts that Mrs. Shaw had felt that she had been kidnapped and that she said she carried the gun to protect herself. But the doctor never claimed these facts as a basis for his opinion, and he admitted on cross-examination

that he had never even inquired of Mrs. Shaw how far she would go in protecting herself. (TR. 33).

The reiterated rule in this jurisdiction as to both lay and expert witnesses is that "Opinion evidence, to be of any value, should be based either upon admitted facts or upon facts, within the knowledge of the witness, disclosed in the record. Opinion evidence that does not appear to be based upon disclosed facts is of little or no value." Balaban & Katz Corp. v. Commissioner of Internal Revenue, 30 F.2d 807, 808 (7th Cir. 1929), quoted and relied upon in Giant Food Stores, Inc. v. Fine, 106 U.S. App. D.C. 95, 269 F.2d 542 (1959). Rollerson v. United States, 119 U.S. App. D.C. 400, 343 F.2d 269 (1964). Hawkins v. United States, 114 U.S. App. D.C. 44, 310 F.2d 849 (1962), 2 Wigmore § 672-84, § 1927 (3d Ed. 1040). See also Dusky v. United States, 295 F.2d 743, 754 (7th Cir. 1961): "Expert opinion as to insanity rises no higher than the reasons upon which it is based".

The total lack of support or "basis" for the testimony about dangerousness can best be appreciated by comparing it to the areas which should have been explicated as conceivably offering a basis for the opinions. Had she ever used a gun or any weapon, or assaulted anyone? Did she reveal in examination any thoughts of so doing, or desire to so do? Did she exhibit anger or emotional tones toward these she believed were her persecutors? What were the circumstances of her prior admission to mental hospitals in terms of whether they involved anti-social acts. Nothing like these issues were explored. The testimony of the witnesses was a bare assertion of opinion which the jury was invited to take or leave -- with no facts upon which to base its own judgment.

The error here was further compounded on cross-examination when defense counsel sought to explore the basis for Dr. Konchegul's opinion that Mrs. Shaw was injurious, by asking whether the expert felt that all paranoids were dangerous. This line of

inquiry was cut off by the Court, in the face of the explanation by counsel of her purpose. (TR. 31).

Not only was the critical issue in the case removed from the jury by the unsupported statements of a lay and two expert witnesses, but this extreme and unhealthy situation was compounded by the Court's instruction that "It is the opinion of both psychiatrists, the Mental Health Commission, and the hospital that she is mentally ill and would be dangerous to herself or others if allowed to remain at liberty." [3/] (TR. 66-67).

The case is like Simmons v. United States, 92 U.S. App. D.C. 122, 201 F.2d 427 (1953) in which this Court reversed a conviction on the ground that

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3/ The Court's instruction also included a sentence to the effect that "persons suffering from schizophrenia paranoid type, indicate that by the manifestation of symptoms that people are following them and have ideas of persecution." (TR. 67). But neither of the experts had offered these facts as a basis for his testimony that Mrs. Shaw was dangerous, nor could they have. No reasonable person could think that the simple fact that a woman felt persecuted and thought people were following her is a basis for a conclusion that she would therefore act harmfully to those people.

the jury had been "entrenched upon" when officers testified to ultimate issues without supporting facts, and the Court had reinforced the error by its charge. Also, in Giant Food Stores, Inc., supra, a verdict for a plaintiff in a negligence case was reversed on the ground that the testimony of an expert, offered with no basis in facts known to him, was too "speculative" to support the verdict.

The problems of evidence in a mental health jury trial are the same as those over which this Court has agonized when the insanity defense is raised in a criminal case. Basically a community judgment is being sought in an area dominated by experts. Again, and again, this Court has returned to the reiteration of basic evidence law in reference to psychiatric testimony, and entreated, exhorted and finally required experts to testify to the basis of their opinions. Washington v. United States, 129 U.S. App. D.C. 29, 390 F.2d 444 (1967). In Washington this Court adopted the view that psychiatrists should not testify whether the

alleged offense was the product of mental illness because this is the ultimate issue for the jury. "Injuriousness" is even less fit an issue for opinion evidence than "product," as this Court very recently stated:

> Psychiatrists should not be asked to testify, without more, simply whether future behavior or threatened harm is 'likely' to occur. For the psychiatrist 'may -- in his own mind -- be defining "likely" to mean anything from virtual certainty to slightly above chance. And his definition will not be a reflection of any expertise, but * * * of his own personal preference for safety or liberty.' [Quoting and citing Dershowitz, "Psychiatry in the Legal Process: 'A Knife that Cuts Both Ways,'" Address Delivered at the Harvard Law School Sesquicentennial Celebration, September 22, 1967.] Of course, psychiatrists may be unable or unwilling to provide a precise numerical estimate of probabilities, and we are not attempting to so limit their testimony. But questioning can and should bring out the expert witness's meaning when he testifies that expected harm is or is not 'likely.'

Cross v. Harris, supra, ___ U.S. App. D.C. ___, 418 F.2d at 1100-1101.

On analogy to Washington, supra, and because of the abuses revealed in the instant record, this Court should rule that experts in mental health cases not be allowed to testify to anything other than their examinations, observations and whatever predictions of specific kinds of behavior they are able to make on the basis of history and examination. Then, the jury will have before it unsullied the issue of whether it finds these predicted kinds of actions "injurious," and intolerable to the community.

There is, moreover, even serious question in this case about the observational (as compared to the factual) basis for the testimony of the doctors. Dr. Konchegul testified that he had seen Mrs. Shaw only once for purposes of a diagnosis, and this was on August 6, 1969, some ten weeks before the trial. (TR. 19). Dr. Angelos testified that he had seen her at the Mental Health Commission hearing (August 21, 1969) for ten or fifteen minutes and had examined her the day before the October 22 jury trial. When asked if he had examined her on the day before in order to "prepare" for court, he

responded that he had examined her "to ascertain if she was still mentally ill". (TR. 41). But there was no indication that he had ever examined her for the purposes of determining whether she was likely to injure herself or others. The issue of sufficient observational basis is a baseline one of admissibility. 2 Wigmore, Evidence §§ 562, 669 (3d Ed.); Rollerson, supra, p. 19.

The baseless testimony of the major government witness was further distorted by the allowance of what may well be the most objectionable hypothetical question ever asked in any courtroom. On redirect examination, the government was allowed to ask Dr. Konchegul:

> Q. If she went into the community today, do you think it is possible she might feel herself endangered by others and she might harm herself again, and that she might make a mistake and some person who was not a member of a great conspiracy might be seen by her as a member of a conspiracy and might use that weapon?

It is "horn-book" law that hypothetical questions must be based on facts that have been or will be introduced into evidence. 2 Wigmore, Evidence § 682 (3d Ed.). There was no scintilla of evidence

that Mrs. Shaw: 1) had ever harmed herself; 2) thought there was a "great conspiracy" after her; 3) had ever used, or even attempted to use a weapon much less "that weapon".

In addition to being improper because not based on evidentiary facts, the hypothetical question was argumentative, conjectural, unintelligible, and too indefinite to form a judgment of value.[4/]

The testimony of the government witnesses was largely unobjected to at trial. But this should not be an outcome-determinative factor in this case. The transcript reveals an atmosphere of formlessness which made it impossible for even an experienced attorney to play a traditional role. The tone of

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4/ See Goldstein, Trial Technique, § 18.34 and cases there cited (2d Ed. 1969):

"A hypothetical question may be objectionable because it is a purely theoretical question, too indefinite to permit the witness to form a judgment of any value, misleading, ambiguous, unintelligible, where it shows misconception of the evidence, when it is complicated, vague, involved or obscure, argumentative, when it calls for mere conjecture, where it does not present sufficient facts upon which to base a reasonable conclusion, ... or where it is based on an assumption which is false or assumes facts which are not in evidence".

the entire proceeding was set at the very beginning of the trial when counsel seeking the opportunity to object if proposed instructions were not given was told "In the future, don't ever do this sort of thing". (TR. 3). The uncertainties about what procedures, or indeed whether any procedures obtained are evident in the record. Counsel was told, "You are doing something we don't usually do" [in submitting instructions], and when she commented that instructions and closing arguments were very important, the Court responded "I don't think so, but I will go along with you." (TR. 2-3). From comments such as these, it is clear why counsel did not here play as aggressive a role as usual in monitoring the evidence. 5/

5/ Another example of the lack of any discernible form to these proceedings occurred when the Court told the jury that part of the instruction was being given at the request of counsel, implying that this was some fancy of hers rather than a statement of the law. (TR. 67). (Such a practice was specifically disapproved in U.S. v. Harris, 346 F.2d 182, 185 (4th Cir 1965)). Also, the Court announced that closing argument was not usually allowed (TR. 54) which again had the effect of suggesting that this trial was somehow not a trial, and that argument was not an important part of it.

Secondly, in the mental health area, again on analogy to criminal cases involving the insanity defense, counsel attempting to deal with psychiatric experts are often unable to operate with full effectiveness: "The ultimate responsibility -- and power -- to prevent witnesses from violating rules of evidence lies with judges." Campbell v. United States, 113 U.S. App. D.C. 260 at p. 277, 307 F.2d 597 at p. 614 (1962)(Burger, J. dissenting)(views adopted in Washington, supra, n. 30).

Finally, the conclusory testimony without factual support, went so immediately to the heart of the fact-finding process, involving as it did the only issue in the case, that this Court must find plain error affecting substantial rights. Rule 52(b), Fed. R. Crim. P., Rule 61, Fed. R. Civ. P.

III THE JURY WAS IMPROPERLY INSTRUCTED AND LARGELY LEFT WITHOUT GUIDANCE FOR APPLYING THE LAW

A critical phase of any jury trial, civil or criminal, is the instruction to the jury wherein the

Court seeks to:

> ... guide, direct and assist the jury toward an intelligent understanding of the legal and factual issues ... He must fairly and impartially state the issues and applicable law in logical sequence and in the common speech of man if the jury is to understand the issues and intelligently apply the law.

Elbel v. United States, 364 F.2d 127, 134 (10th Cir. 1966).

The charge in this case was defective in at least three respects: it failed to instruct adequately on the issue of dangerousness; it unfairly summarized the evidence; it incorrectly stated the law on the burden of proof. The Court failed to define the meaning of "injury", or the degree of injuriousness required for commitment.[6/] The total explanation given to this jury of the law which they were to apply to the facts on this issue was

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6/ Counsel for the patient submitted an instruction on the meaning of "likelihood" which the Court gave in part as an obvious afterthought. (TR. 68). But on the very issue before the jury, the definition of injuriousness, no instruction was submitted and none was given.

"The only question you have to answer is, as a consequence of her mental illness, if she is allowed to remain at liberty, is she dangerous to herself or others ... do you find she is likely to injure herself or others if allowed to remain at liberty." (TR. 66).

The situation here is exactly analogous to the failure to instruct on an element of the offense in a criminal case, which has been held to be plain error, and grounds for reversal, even in the absence of objection or request by counsel. Byrd v. United States, 119 U.S. App. D.C. 360, 342 F.2d 939 (1965); Jackson v. United States, 121 U.S. App. D.C. 160, 348 F.2d 772 (1965).[7/]

7/ See Screws v. United States, 325 U.S. 91, 107 (1945):

"And where the error is so fundamental as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest, we think it is necessary to take note of it on our own motion." 325 U.S. 107 (1945).

United States v. Noble, 155 F.2d 315 (3rd Cir. 1946). See also Tatum v. United States, 88 U.S. App. D.C. 386, 190 F.2d 612 (1951) (Holding it reversible error to fail to instruct on insanity when there had been some evidence on the issue but the defense counsel had not requested an instruction.)

In civil litigation as well, the duty is on the court to charge the jury on the material issues in the case, even in the absence of a request to charge or objection to the charge given. Rowlik v. Greenfield, 87 F. Supp. 997, 999 (E.D. Pa. 1949), aff'd. 179 F.2d 678 (3rd Cir. 1950); Callen v. Pennsylvania R. Co., 162 F.2d 832, 835 aff'd. on other grounds 332 U.S. 625 (1948).

Just as a jury in an appropriate criminal case must be informed that robbery requires a showing of force and violence, Byrd, supra or specific intent Jackson, supra, so here the jury should have been informed that injuriousness includes some specific kind or degree of harm to self or others. As it was, this jury simply could not know whether they must find Mrs. Shaw homicidal or merely, as the government argued, (TR. 64-65) unskilled in the loading and handling of guns.

The Court, moreover, mentioned no factors arguably favorable to respondent on the issue of injuriousness, although counsel had submitted an

instruction advising the jury to consider "what you have been told of Mrs. Shaw's history and background, her demeanor and manner in the courtroom, the opportunity the doctors had to observe and talk to her, the testimony as to her manner when she came to the White House, and whatever other evidence seems to you to be important." (R. 15).* Instead the Court offered for consideration only the fact that "It is the opinion of both psychiatrists, the Mental Health Commission, and the hospital that she is mentally ill and dangerous to herself or others if allowed to remain at liberty." (TR. 67).[8/]

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* Reference is to the record on appeal which includes copies of instructions submitted for respondent.

8/ Even this meager and biased instruction was incorrect since there had been no evidence whatsoever that "the hospital" considered appellant likely to injure herself or others.

Perhaps the unkindest cut of all came at the end of the charge when after announcing to the jury that it was giving the substance of a charge submitted by the counsel for the patient, the Court actually delivered the converse of the instruction. The submitted instruction was that the diagnostic label "paranoia" does not automatically mean that the person is likely to injure self or others. (R. 14). The Court's actual charge was that "you are to weigh the diagnosis with the evidence in the case and make the determination yourself from all the evidence in the case, whether she is dangerous to herself or others." (TR. 67).

Perhaps most egregiously, the Court summarized and referred to the evidence for the government but mentioned not one word about the respondent's evidence. Comments on the evidence must be fair and even-handed. Quercia v. United States, 289 U.S. 466 (1933). In Sperber v. Connecticut Mut. Life Ins. Co., 140 F.2d 2 (8th Cir. 1944), cert. denied, 64 S. Ct. 939 (1944), the Eighth Circuit reversed where the trial court had mentioned an important fact which supported the appellee's case, and omitted a mention of another fact supporting the appellant:

> While a federal trial court is not at all required to state his recollection of the evidence with nice exactitude for both sides, yet, if such summary is made, it must be fair to both sides to the extent that it is not so one-sided or so warped that it must be regarded as prejudicial to one side in its effect upon the jury [citing cases]. As stated in Starr v. United States, 153 U.S. 614 626, 14 S, Ct, 919, 923, 382 2d Ed 841 'The evidence, if stated at all, should be stated accurately, as well that which makes in favor of a party as that which makes against him ...'

140 F.2d at 5.

The complete instruction on burden of proof consisted of these two sentences: "The burden of proof in this case is upon the Government, represented by Mr. Ackerman here to prove the case of the Government by what we call the preponderance of the evidence. That is, that evidence which, weighed with that opposed to it, has the more convincing value." (TR. 66).

This instruction is insufficient because it fails to advise the jury that the government bears the risk of non-persuasion. The Revised Standardized Jury Instructions for Civil Cases published by the Bar Association, includes on preponderance the sentence spoken by the Court in this case, but the jury is then advised that the number of witnesses produced is not determinative, and finally told: "Should you believe that the evidence bearing on any essential point is evenly balanced then your finding as to that point must be against the party carrying the burden of proof". Appellant contends that this last sentence is essential to a correct

charge because otherwise the jury is not informed of the consequences of the government's failure to carry its burden. James, Civil Procedure, §§ 7.6 7.8 (1965). Compare McKenzie v. United States, 75 U.S. App. D.C. 270, 273, 126 F.2d 533, 536 (1942).

> To experienced lawyers it is commonplace that the outcome of a lawsuit -- and hence the vindication of legal rights -- depends more often on how the factfinder appraises the facts than on a disputed construction of a statute or interpretation of a line of precedents. Thus the procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding these rights.

Speiser v. Randall, 357 U.S. 513, 520 (1958).

In Speiser, the Court held that where first amendment rights were at issue, the State could not consistently establish a procedure whereby the burden of persuasion was shifted away from the government. In the instant case, where liberty is involved, the Court effectively relieved the government of the burden of persuasion by failing to instruct the jury on it.

Since neither the civil nor criminal rules of procedure are applicable in mental health jury trials,[9/] the provisions that error cannot be predicated on the charge unless specific objection was made, Rule 30, Fed. R. Crim. P., Rule 51 Fed. R. Civ. P. do not apply to any of the above errors. In this case, particularly, however, counsel at the outset had tried to get some agreement on what the

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9/ The trials are palpably non-criminal, and the Federal Rules of Civil Procedure specifically exempt from coverage Mental Health proceedings in the District of Columbia. Rule 81, Fed. R. Civ. P.

rules of the trial would be, including the opportunity to make specific objections to the charge, and was told by the Court: "In the future, don't do this sort of thing". (TR. 3). Although counsel did make it to the bench to voice objections to the charge, she was cut off in the midst of so doing by the Court's offer to give another submitted instruction, which he then proceeded to give in part. (TR. 68). The obvious purpose, moreover, of both Rules 30 and 51 is to allow the Court to correct any misstatements or omissions in the charge. Here the entire charge was so irrelevant and removed from the point at issue, that the only remedy would have been an entirely new and different charge.

The total inadequacy, not to say inanity, of the charge, springs from the lack of rules and procedures in mental health cases.[10/] Unlike criminal or civil cases where the Bar has produced standardized jury instructions, where there are, in addition, numerous cases on proper instruction, and where, in

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10/ Part IV of this Brief argues that a jury trial without procedural rules violates due process.

practice, every court has developed its own instructions for various situations, there is no body of instructions for mental health cases. The result of this ruleless void is the blatantly improper charge given in this case.

IV A JURY TRIAL CONDUCTED WITHOUT FORMAL RULES AND IN VIOLATION OF THE LAW OF EVIDENCE DENIES DUE PROCESS AND A FAIR TRIAL

The 1964 Hospitalization of the Mentally Ill Act, 21 D.C. Code 521, et seq. provides for jury trials on demand on the issues of mental illness and injuriousness. It does not however, establish any rules or burden of proof for these trials. The Federal Rules of Civil Procedure specifically state that "They do not apply to mental health proceedings in the United States District Court for the District of Columbia". Rule 81, Fed. R. Civ. P.

At the outset of this trial, the Court told counsel: "The rules of evidence apply, but we do away with formality as much as we possibly can".

(TR. 3). But "There is no place in our system of law for reaching a result of such tremendous consequences without ceremony. ..." In Re Kent, 383 U.S. 541, 554 (1966).

The trial in the instant case is an example of what happens when liberty is put into issue without "formality" or "ceremony". Nobody involved in the trial played the traditional role necessary for presentation of facts to a jury. Witnesses testified in violation of the rules of evidence, the Court failed to instruct the jury on the law to be applied to the case. The "trial" was actually a hearing without metes and bounds, wherein the jury must necessarily have been as confounded as counsel in attempting to deal with the issues.

In mental health jury trials, as the Supreme Court has held in other areas, "The requirements of due process cannot be satisfied by partial or niggardly procedural protections." Specht v. Patterson, 386 U.S. 605 (1967), citing and quoting from Gerchman v. Maroney, 355 F.2d 302, 312 (1966). In Specht, the

Court held that a procedure for determining that a convicted offender fell within a statute making him eligible for a greater sentence violated due process because it did not provide "the right to a hearing, confrontation, and so on", 386 U.S. at 608.

Appellant here contends that in a jury trial a recognized order of procedure, observance of common law rules of evidence, and a proper charge to the jury on the law are as basic to due process as counsel, right to a hearing and confrontation.

In Holm v. State, 404 P. 2d 740 (Sup. Ct. Wy. 1965), the Wyoming involuntary commitment statute provided for jury trials, but added that they were to be conducted "in as informal a manner as may be consistent with orderly procedure", and that the Court would not be "bound by the rules of evidence". This part of the statute was severed from the rest in Holm as providing a procedure in violation of due process.

Without a clearly established order of procedure, the judge is free to grant or deny the requests of counsel for even procedures basic to the presentation of adversary views. The instant record makes clear just how unfettered is the court's discretion in mental health cases. The Court told counsel not to submit requested instructions in the future, that the Court didn't think that closing argument and instructions were vitally important, (TR. 3-4). At the outset of counsel's argument the Court informed the jury that this was not usual in mental health cases, clearly indicating that argument is accorded on a case-by-case basis.

Early in the administrative law area, the Supreme Court found that unfettered discretion, without limits or standards for its exercise, denied due process. Shields v. Utah Idaho Cent. R. Co., 305 U.S. 177 (1939); Morgan v. United States, 304 U.S. 1 (1938).

The deprivation of liberty by a ruleless trial is also analogous to the infringement on

First Amendment rights which the Supreme Court has found when statutes regulating the opportunity for speech are vague or standardless. In the latest of such cases, the Court invalidated a conviction springing from an ordinance which conferred upon the Birmingham City Commission "virtually unbridled and absolute power ..." Shuttlesworth v. Birmingham, 394 U.S. 147 - 150 (1969).

In Giacco v. Pennsylvania, 382 U.S. 399 (1966) the Court found a criminal statute so vague and standardless that it "leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case." See also Ricks v. District of Columbia, ___ U.S. App. D.C. ___, 414 F.2d 1111 (1968) and cases cited therein.

STATEMENT OF PRECISE RELIEF SOUGHT IN THIS CASE

If the Court agrees with Point I that the evidence was insufficient to support the verdict in this case, counsel submits that the judgment should be reversed, and the cause remanded to the District Court with direction to vacate the order of judicial hospitalization, and release the patient.

If the Court disagrees that the evidence was insufficient to support the verdict, but agrees with counsel on all or any one of Points II, III and IV, the relief sought is reversal of the judgment and remand for a new trial, with directions that the District Court establish rules of procedure for the retrial of this case and for all future mental health jury trials.

> " ... many situations have arisen in which the courts must fashion procedural steps to meet the requirements of justice and basic principles".

Seagram & Sons, Inc. v. Dillon, 120 U.S. App. D.C. 112, 344 F.2d 497, 500 (1965).

> " ... Clearly in these circumstances [Congressional silence in the statute], the habeas corpus jurisdiction and duty to exercise it being present, the courts may fashion appropriate modes of procedure, by analogy to existing rules or in conformity with judicial usage. Where their duties require it, this is the inescapable obligation of the court".

Harris v. Nelson, 394 U.S. 286, 299 (1969).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief has been hand delivered upon the Office of the United States Attorney, United States Courthouse, this _____ day of April 1970.

Barbara Allen Bowman